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ABSTRACT

This paper is designed to familiarize parents of children with disabilities about why and how Section 504 of the Rehabilitation Act of 1973 affects the education of children with disabilities, to illustrate the differences between Section 504 and the Individuals with Disabilities Education Act (IDEA), and to provide a basic explanation of how Section 504 works. The purpose of Section 504 is stated as the elimination of impediments to full participation by persons with disabilities. Section 504 is described as protecting all persons with a disability who have a physical or mental impairment which substantially limits one or more major life activities, have a record of such an impairments, or are regarded as having such an impairment. Information is provided on Section 504 regulations that address: (1) free appropriate public education; (2) student evaluation; (3) placement decisions; (4) procedural safeguards, including parental notice, consent, and impartial hearings; and (5) complaints and compliance. (CR)

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Section 504 and IDEA: Basic Similarities and Differences

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Although parents of children with disabilities are frequently more familiar with the Individuals with Disabilities Education Act (IDEA), they should also acquaint themselves with Section 504 of the Rehabilitation Act (hereinafter "Section 504"). Knowledge of both statutes, and particularly their implementing regulations, often is necessary to be sure of securing an appropriate education for children with disabilities. Indeed, for some children with disabilities, Section 504 may be more important -- the only legal mandate requiring education agencies to provide special education or related services to a child with a disability.

This article will familiarize parents with why and how Section 504 impacts the education of children with disabilities; illustrate some of the differences between Section 504 and IDEA; and provide a basic explanation of "how Section 504 works." It is vital to remember, however, that literally volumes have been written on these topics and, therefore, no one should rely solely on this article to undertake legal action. A suitable next step in the learning process might be review of RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (Shepard's/McGraw-Hill, Colorado Springs, Colorado: 1984), a concise but very sophisticated explanation of this area by Professor Laura F. Rothstein of the University of Houston School of Law.

What Is the Purpose of Section 504?
Section 504 was enacted to "level the playing field" - to eliminate impediments to full participation by persons with disabilities. In legal terms, the statute was intended to prevent intentional or unintentional discrimination against persons with disabilities, persons who are believed to have disabilities, or family members of persons with disabilities.1

Though enacted almost 25 years ago, until recently Section 504 has been largely ignored by schools. Given the statute's tempestuous history, this is little short of shocking. Two years after Section 504 was enacted, advocates held highly publicized demonstrations on the doorstep of the then-U.S. Department of Health, Education and Welfare simply to get the Department to adopt implementing regulations. But since then, the statute, regulations and their mandate have been considered by many as the "black hole" of the education law universe.

What Is the Difference Between Section 504 and IDEA?
There are a number of differences between the two statutes, which have very different, but complementary, objectives. Perhaps the most important is, as has been stated, that Section 504 is intended to establish a "level playing field" - usually by eliminating barriers that exclude persons with disabilities - whereas IDEA is remedial - often requiring the provision of programs and services in addition to those available to persons without disabilities. Thus, Section 504 precludes hurdles to participation, whether physical - steps that prevent a person in a wheelchair from accessing a building - or programmatic - excluding a child with hepatitis from a classroom. By distinction, IDEA is similar to

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an "affirmative action" law: as some have asserted, school children with disabilities who fall within IDEA's coverage are sometimes granted "more" services or additional protections than children without disabilities.

The "more" and "additional" denote another important difference between Section 504 and IDEA. While IDEA requires "more" of schools for children of disabilities, it also provides schools with additional, if insignificant, funding. Section 504 requires that schools not discriminate, and in some cases undertake actions that require additional expenditures, but provides no additional financial support. For this reason, schools often drag their feet in providing needed services to children under Section 504, and are less hesitant to openly discuss the limitations of funding. And the fact is that while their legal obligation may be no less, as a practical matter it is often extremely difficult to obtain the administrative and judicial support needed to secure compliance. The eligibility-based approach of IDEA makes students protected by Section 504 something of a square peg in a round hole. Often these students, because of their special needs, were put off by "regular" education, but they weren't encompassed by "special" education because they could not be counted for the funding that drives IDEA. Particularly these days, there is little incentive for schools to take responsibility for students who come with no funding.

A distinction (perhaps) without a difference between IDEA and Section 504 is that the former applies to education agencies who seek to obtain funds under that specific statute, while the latter applies to education agencies if even a single of their programs or activities receive financial assistance from any Federal source. For educational institutions, the term "program or activity" includes any of the operations of a State educational agency (SEA) and local educational agency (LEA) receiving federal funds regardless of whether the specific program or activity involved is a direct recipient of the federal funds.**2** In fact, for a brief period following enactment of IDEA (then the Education of All Handicapped Children Act), the state of New Mexico did not seek funds under the statute, thereby avoiding its detailed reporting and procedural requirements. However, after a lawsuit by advocacy groups alleging that the State's education programs failed to comply with Section 504, the State concluded that since its service obligations under Section 504 were essentially identical to those under IDEA, there seemed little point to not seeking IDEA funding.

A fourth important difference between the two statutes is who is protected by them. The definition of a disability under Section 504 is much broader than the definition under the IDEA. As the illustration below is intended to show, all IDEA students are also covered by Section 504, but not all Section 504 students are eligible for services under IDEA.

As a practical matter, this means that not all children with disabilities are entitled to services under IDEA, only those who are "eligible" under the specified disability categories. Section 504 is less discriminatory: it protects all persons with a disability who

1. have a physical or mental impairment which substantially limits one or more major life activities;

2. have a record of such an impairment; or

3. are regarded as having such an impairment.

The Section 504 regulations further define a "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine: or any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

There is some legal gloss to this apparently straight-forward text. To fall within the protection of Section 504, a person's physical or mental impairment must have a substantial limitation (permanent or temporary) on one or more major life activities - functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. Insofar as school children are concerned, the critical question is whether a student's impairment substantially limits the ability to learn. It is not true, as some school personnel responsible for administration of Section 504 have contended, that the impairment must be of a life activity other than or in addition to learning.

In this regard, two points should be stressed. First, there is no quantifiable standard by which to apply the "substantially limits" test. Second, to determine whether a student's learning is substantially limited, schools need to consider more than the student's grades. Both academic and nonacademic activities need to be considered. For example, if a student with diabetes is barred by the school from participating in class trips because of the impairment, the student's learning is "limited."

Interpreting Section 504's coverage too narrowly has resulted in many districts being found out of compliance for failure to identify students protected solely by Section 504.

Following are examples of students who may be protected by Section 504, but who may not be eligible for services under the IDEA:

- students with communicable diseases (i.e., hepatitis);
- students with temporary disabilities arising from accidents who may need short term hospitalization or homebound recovery;
- students with allergies or asthma;
- students who are drug addicted or alcoholic, as long as they are not currently using illegal drugs
- students with environmental illnesses;
- students who are 22 or older depending on state law; parents with disabilities.

What is the Relationship Between Section 504 and the ADA?
The Americans With Disabilities Act (ADA), enacted in 1990, has deep roots in Section 504. In many ways, the ADA is Section 504 "writ large."**3** The primary difference is that while Section 504 applies only to organizations that receive Federal funding, the ADA applies to a much broader universe. However, with respect to education, the ADA's objectives and language are very similar to Section 504, and for this reason both statutes are administered by the Office for Civil Rights and considered essentially identical.

The Section 504 Regulations:
Section 504 has a specific set of regulations that apply to preschool, elementary and secondary programs that receive or benefit from federal financial assistance. These are found at Title 34 of the Code of Federal Regulations (CFR), Part 104. Although the ADA applies to public schools by virtue of Title II, the regulations have no specific provisions regarding education programs. Therefore, in interpreting the ADA, the OCR uses the standards under Section 504 except where Title II provides otherwise. In effect, virtually every violation of Section 504 is also a violation of the ADA as it applies to students; in fact, the OCR has stated that complaints alleging violations of one statute will automatically be investigated for violations of the other. A fairly detailed explanation of the areas considered and what OCR looks for

in reviewing compliance with ADA and Section 504 can be obtained by reviewing the compliance manual issued by OCR.

Free Appropriate Public Education:
Section 504 is broader than the Individuals With Disabilities Education Act (IDEA) not only with respect to the persons protected, but also in the scope of what is considered a "free appropriate public education" (FAPE), a term used in the implementing regulations for both statutes. Thus, while IDEA defines FAPE to include the provision of special education and related services (34 C.F.R. Reg. 300.8), the Section 504 definition includes the provision of special or regular education and related services.[4]

A few points need to be highlighted. Since Section 504 is a non-discrimination law, any analysis of an appropriate education for a student with disabilities needs to include the educational opportunities provided to students who are not disabled. This is because an appropriate education is one which meets the needs of a student with disabilities as adequately as the needs of students without disabilities. Unlike IDEA - which focuses on the unique educational needs of the student - Section 504 looks at comparing the education of students with and without disabilities.

The United States Supreme Court underlined this point in the case Southeastern Community College v. Davis, 442 U.S. 397 (1979), when it held that an otherwise qualified individual with a disability under Section 504 is one who, with reasonable modifications, is able to meet all of the program's requirements in spite of his or her disability. The Court stated that Section 504 does not impose an affirmative action obligation upon entities covered since its intent is non-discrimination.

Subsequent court decisions have affirmed that a school's obligations under Section 504 are not limitless, but often require a balancing of competing factors. As the Second Circuit Court of Appeals stated in Rothschild v. Grottenthaler et. al., 907 F.2d 286 (2nd Cir. 1990), Section 504 "must be responsive to two powerful but countervailing considerations: the need to give effect to the statutory objectives and the desire to keep Section 504 within manageable bounds."

Second, under IDEA all services included in a student's individualized education program (IEP) must be provided at no expense to the student or the parents. Under Section 504, however, while a school may not require parents of disabled students to pay the costs associated with necessary accommodations or services, fees charged to all parents of the general student population, e.g., athletic locker fees or library card charges, may also be collected from parents of students with disabilities. Again the analysis calls for a comparison.

Evaluation Requirements:
Paralleling IDEA, Section 504 has specific procedural requirements for the identification, evaluation, placement and procedural safeguards of preschool, elementary and secondary students.

▸ Child Find
Section 504 puts the responsibility for identifying and locating students with disabilities on the school. A school must annually undertake efforts to "identify and locate" every qualified individual with a disability residing in the school's jurisdiction who is not receiving a public education.

▸Evaluations
Public elementary and secondary schools are required to "establish standards and procedures" for the evaluation and placement of students who, because of disability, need or are believed to need special education or related services, before taking any action with respect to the initial placement in a regular or special education program and any subsequent significant change in placement.

A common failing of school districts is to evaluate only those students who fall within the IDEA categories, or to have no separate written evaluation procedures. As previously noted, Section 504's definition is broader than the IDEA's. Therefore, a district's procedures and staff training should emphasize that a student may require an evaluation under Section 504 even if there is no reason to suspect that the student is in need of special education services under an IEP.

The evaluation procedures, like those under IDEA, must ensure that:

- tests and other evaluation materials have been validated;
- evaluations are administered by trained personnel;
- evaluations are tailored to assess specific areas of educational need;
- tests are selected and administered that accurately reflect the factors the test purports to measure.

Procedurally, when interpreting the evaluation data, schools should draw upon information from a variety of sources (i.e., tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior). The school also must establish procedures to document that the evaluation information has been considered. The form of documentation is discretionary and could include such things as meeting notes or evaluation reports or summaries. This is the only place where the regulations specifically require documentation. However, as a practical matter, a school should be in a position to provide documentation if challenged to prove that it complied with requisite procedures. For example, parents must be provided with notice of the school's actions with regard to the evaluation of their child. See 34 C.F.R. Reg.104.36 and OCR Memorandum to Senior Staff (October 1988). Although the regulations do not require that the notice be in writing, best practice would dictate documentation of this notice requirement.

There are no timelines for evaluations under Section 504. The OCR interprets the regulations as requiring evaluations to be completed "within a reasonable period of time." What this means as a practical matter, unfortunately, is that a substantial amount of time can elapse between identification and completion of evaluation. Remember, however, that the IDEA regulations suffer from the same defect.

Placement Decisions:
Again, the placement decision procedures under Section 504 are comparable to those under IDEA. The school must ensure that individuals who are knowledgeable about the student, the meaning of the evaluation data and the placement options are involved. The placement decision must also be made in conformity with the least restrictive environment provision. 34 C.F.R. Reg. 104.34. But unlike IDEA, Section 504 does not prescribe the membership of the team. It is up to the district to determine whether parents will be included as members of the team. When interpreting the Section 504 provision on "least restrictive environment," the courts have been guided by the interpretations of the LRE provision under the IDEA.

With respect to disciplinary considerations, it was OCR that originally adopted the position that an expulsion or suspension of a student for more than ten consecutive days constitutes a "significant change of placement" under Section 504, subsequently adopted by OSERS/OSEP in interpreting IDEA. In addition, before a student with a disability under Section 504 is suspended for more than ten days cumulatively in a school year, the school's placement team needs to determine whether the series of suspensions creates a pattern that constitutes a "significant change of placement." That determination must be made on a case-by-case basis, taking into account such factors as the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the student is excluded from school.

In addition, the placement team needs to decide whether the misconduct is a manifestation of the student's disability. The team may need to supplement the evaluation data before making this decision. If the team decides that there is a connection, the student cannot be suspended for more than ten days or expelled. If the team concludes there is no connection, the student would be subject to the school's regular disciplinary procedures. Note that this is a different result from that required by the OSEP until recently under IDEA.

The LRE provision in Section 504 also has been used by the courts to address the right of students who are HIV positive or have full-blown AIDS to be educated in school environments. To legally segregate a student with AIDS from other children in a classroom, it must be determined that more than a "remote theoretical possibility" of transmission of the virus exists. It must be found that there is a significant risk of transmission despite making "reasonable accommodations." Martinez v. School Board of Hillsborough County, Florida, 861 F.2d 1502 (11th Cir. 1988).

Procedural Safeguards:
Section 504 requires recipients (every public elementary and secondary school) to provide a system of procedural safeguards, including:

- notice;
- opportunity for parents or guardians to examine relevant records;
- impartial hearing with an opportunity for participation by parents/guardians and representation by counsel;
- review procedures.

In this regard, the Section 504 regulations offer schools a choice: they can adopt a set of procedures specifically for Section 504 proceedings, or they can follow the procedural safeguards required by IDEA. This is a bit of a Hobson's Choice since the IDEA requirements are more extensive than those under Section 504, as will be discussed. Surprisingly, however, many schools have done neither.

▸Notice
Section 504 requires that parents receive notice of actions regarding the identification, evaluation and placement of their children. The notice does not need to be in writing, although many districts do provide written notice so they can document the event if they are challenged.

▸Consent
There is no consent requirement under Section 504. The IDEA requires that parents provide written consent prior to the initial evaluation and the initial placement of their child.

▸Impartial Hearing
States differ on whether the IDEA hearing officers are authorized to hear and rule on Section 504 issues or claims. If they are not, then a school district must be prepared to provide an alternative hearing procedure. The regulations do not specify the timelines or impartiality requirements in conducting the impartial hearing, but the OCR applies a standard of "fundamental fairness" and will be guided by IDEA case law and other decisions.

A significant number of states, but not all, have authorized their IDEA hearing officers to hear Section 504 issues raised by the parties in a due process hearing. A policy reason for doing this has been the desire to avoid duplicate and simultaneous hearings under the IDEA and Section 504 based on the same fact situation.

Complaints, Compliance and Monitoring:

▸ Complaints of Violations
As previously mentioned, a student or parent has the right to file a complaint if he or she believes discrimination has occurred. Initially, the complaint should be filed with the school's or school district's Section 504 compliance officer. However, it is not unusual for school district personnel to be unaware of who serves as the compliance officer, and sometimes for the good reason that there is none. That, in an of itself, is a violation of Section 504. Utilizing this complaint process does not limit access to other enforcement options, either at a later date or simultaneously. And there is no Section 504 requirement, comparable to the IDEA, requiring state education agencies to establish state complaint systems for allegations that school districts are not complying with Section 504 and ADA requirements.

A complaint may also be filed with the Office for Civil Rights itself (usually the regional office) which, in addition to technical assistance activities, conducts compliance reviews and complaint investigations. The scope of Section 504 complaints is very broad. It may be filed by any individual or organization and it may address individual student, class, or systemic issues. The complaint must be filed within 180 days of the alleged discriminatory action, although the Regional Director has the authority to waive the time limit in some circumstances.

The OCR will conduct an investigation of the complaint through data collection and written responses to

questions, and may conduct an on site review. An informal process known as Early Complaint Resolution (ECR) is available in individual, but not class, complaints.

The OCR will issue a Letter of Finding, either with a "no violation" conclusion or identifying violations and specifying corrective actions. Failure to implement the requested corrective actions may lead to an administrative hearing, with the possibility that Federal education funds may be terminated.

The OCR has stated that its compliance monitoring generally will focus on whether a school district has followed the policy and procedural requirements of the law and regulations, rather than made the "correct" substantive decision in the specific case before it. In other words, the OCR does not see its role as second-guessing substantive decisions. As the comments to the regulations state:

It is not the intention of the Department except in extraordinary circumstances to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning the identification and location, evaluation, and due process procedures).

▸ Self-Evaluations
School districts were supposed to have conducted a self-evaluation back in 1977. Most school districts either did not conduct the 1977 study or have not been able to locate it. The Americans with Disabilities Act, when enacted in 1990, also required local governmental agencies, including school districts, to conduct a self-evaluation of their services, policies and practices, and their effects for the purpose of determining if they discriminate against individuals with disabilities. If the district employs 50 or more employees, the self-evaluation should have been retained and made available for public inspection for at least three years following its completion. The number of education agencies that have complied with this newer provision is problematic.

▸ Judicial Action
In addition to the above enforcement options, a student or parent may initiate a court action alleging a violation of Section 504, independent of whatever action may be taken under IDEA.

The Rehabilitation Act specifically authorizes a court in its discretion to award reasonable attorney's fees to the prevailing party. In addition to injunctive relief, there is now grounds for the awarding of monetary damages and some recent litigation indicates that it may be possible to recover personal damages from educational personnel under Section 504 in the appropriate circumstances.

Conclusions:
For those children with disabilities not covered by IDEA, the protections of Section 504 are critical. For those children with disabilities who are covered by IDEA, the protections of Section 504 may be more attractive because of their flexibility. On the other hand, Section 504 remains more of a mystery to parents precisely because its protections are not defined as specifically as those under IDEA. For this reason, if no other, parents should consult an attorney before taking any action premised on their rights under Section 504.

Footnotes
1. The text of the legal mandate is remarkably brief; Section 504, 29 U.S.C. §794,states:

> No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

2. A school district is not only prohibited from engaging in discriminatory conduct involving its own programs and activities, but is also prohibited from directly or through contractual, licensing or other arrangements, aiding or perpetuating discrimination against a qualified person with a disability by providing "significant assistance" to an agency, organization or person that discriminates. Among the factors that will be evaluated in determining whether a public school is providing significant assistance

to a private group are:

- direct financial support,
- indirect financial support,
- provision of tangible resources such as staff and materials,
- intangible benefits such as the lending of recognition and approval,
- the selectivity of the school's provision of privileges and resources, and
- whether the relationship is occasional and temporary or permanent and long-term.

3. Patterned after Section 504, the applicable provision of the ADA similarly states in Title II, 42 U.S.C. §12132:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by any such entity.

4. Specifically, a free appropriate public education under Section 504 is defined as "the provision of regular or special education and related aids and services that ... are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and ... are based upon adherence to specified procedures." 34 C.F.R. Reg. 104.33(b)(1)

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